WONG CHONG CHOW v. PAN-MALAYSIAN CEMENT WORKS BHD.

[F.C. (Chang Min Tat, Syed Othman & Salleh Abas F.JJ.) November 12, 13, 14, 15 & 16, 1979 & March 1, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 222 of 1977]

Contract — Building Contract — Erection of kilns — Tender — Lump-sum contract — Extra work — Interest — Costs.

Practice and Procedure — Interest on judgment — Costs — R.S.C. 1957, O. 65 r. 9.

Practice and Procedure — Costs — Whether to be on the lower or higher scale — R.S.C. 1957, O. 65 r. 9.

Evidence — Documentary evidence — Presumption — Burden of proof — Evidence Act, 1950, s. 114(g).

In this case the appellant a contractor successfully tendered for the erection of a kiln for a cement factory. He was required to do extra work and he claimed the sum of $325,000 for such extra work. Part of the claim was for clinker coolers, I.D., exhaust fans etc. and the essential difference between the parties was whether the labour supplied should be paid for by tonnage or by labour charges. The learned trial judge rejected the evidence of the record books which suggested that the payment was to be on a work-rate basis. The learned trial judge also gave interest from the date of judgment and rejected the contention that interest should run from the date of completion of the contract. He also gave the appellant costs on the lower scale without regard to the amounts of the claim and the counterclaim but gave no reasons for the award.

Held: (1) the appellant had discharged the burden on him to prove on a balance of probabilities that the work was to be paid for on a work-rate basis. The burden then shifted to the respondents and as they had not discharged this burden, the award under the head should be increased to $196,766.25;

(2) the learned trial judge should have accepted the documentary proof in this case as they were records ordinarily kept for a claim on a work-rate basis and were shown and duly certified by a representative of the respondents;

(3) on the facts the respondents had deliberately obstructed the Japanese engineer, who it was claimed required the supply of the extra labour and could testify to the correctness of the entries in the work books, from giving evidence and the tactics of the respondent's called for the application of the presumption under section 114(g) of the Evidence Act, 1950, which presumption proved the truthfulness of the work books;

(4) interest in this case should have been awarded from the date of the completion of the contract;

(5) under the Rules of the Supreme Court, costs should have been awarded on the higher scale.

Case referred to:-

(1) *London, Chatham and Dover Rly. Co.* v. *South Eastern Rly. Co.* [1893] A.C. 429, 437.

FEDERAL COURT.

K. Thayalan for the appellant.

V.C. George (*V. Ponniah* with him) for the respondents.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The respondents, desiring to build a cement factory in Malaysia, imported some 6,000 tons of materials for the erection of this factory. They also required to build kilns. Part of the machinery imported went to the fitting out of the twin rotary kilns, but the kilns themselves were brick and mortar, materials obtainable locally and which did not form part of the importation from Japan.

For the erection of the kilns, the respondents called for tenders. Two tenders were received. They were from Lee Wah Trading Engine Works and Thum Yee. It is not a matter of dispute that these tenderers were shown all the documents necessary for the erection of the kilns. They were (1) drawings, (2) an erection manual, (3) welding instructions and (4) the erection schedule.

The appellant is also a contractor but at the time of the calling for the tenders, he did not make any offer. That was for the simple reason that he was not aware of the tender notice. But (and this also is not a matter of dispute) he was subsequently told of this by his friend, one Ng Hong Heng, a director of the respondent company and at his suggestion, if not invitation, he put in a tender. There was a certain informality about his tender. It was contained in a letter. The price he quoted was $126,000, considerably lower than the other two tenders. His was accepted but whether this was because of the figure he quoted or his friendship with this Ng Hong Heng was not clear. The manner in which this tender was made appeared to have been a matter of some considerable importance. It featured prominently at the trial and will have to be referred to later, at an appropriate moment, but for the time being, it is perhaps sufficient to note that in the evidence led by the respondents, the acceptance of his tender was not unqualified and only after some oral discussions.

It is also common to both parties that the appellant did extra work for which he would have to be paid. He quantified the whole work, including the lump-sum contract for the erection of the kilns at $575,270.78, but he said he was paid only $250,000. His claim was for $325,000.

Two observations stand to be made on these pleadings. As we understand the statement of claim, the appellant was paid the $126,000 for the lump-sum contract. His claim therefore was basically for extra work done. Consequently, it seems to us, it would have been more accurately framed by omitting the lump-sum contract and claiming the value of the extra work done at $449,270.78 less $124,000 received, leaving a net claim of $325,270.78. The other remark concerns the prayer for $325,000, a claim rounded off to the nearest thousand. That is either indifferent pleading or unexplained generosity. Perhaps a third observation could be made. The statement of claim did not give the rate or rates at which the extra work was to be paid.

The details of the claim are as follows:

"PARTICULARS

(a)	Clinker coolers, I.D. and Exhaust Fans, Boilers, Dust Recoveries, Clean Water Circulations, Off loading from wagons and other works - - - - - -	$207,718.12
(b)	Contract for Kilns No. 1 and No. 2 -	126,000.00
(c)	Charges for extra work for Kilns No. 1 and No. 2 - - - - - - - -	18,080.00
(d)	Labour for dismantling Coal and Ash Conveyors etc. at Connaught Bridge Power Station - - - - - -	58,500.00
(e)	Labour for loading Coal and Ash Conveyors etc. at Connaught Bridge Power Station - - - - - - -	5,250.00

(f)	Labour for cutting Tippler girders rivets for transporting to Jurong Works at Singapore - - - - - -	1,092.80
(g)	Supply and lay fairface bricks to close wall openings at Connaught Bridge Power Station - - - - -	1,800.00
(h)	Cost of Erection Gantry - - -	21,624.86
(i)	Charges for X'ray welding, supply labour and rods for gouging - -	48,246.50
(j)	Alterations to and erection of Crusher Conveyor, Parallel and Clay Cutter Conveyors at Cement Works - -	56,958.50
(k)	Bonus to compensate overtime work of Kiln No. 1 - - - - - -	30,000.00
		$575,270.78."

There is an error in the claim under (a). The appellant admitted to an excess of $1,727.87. After adjustment, the net claim was therefore for $323,542.91.

The defence was amended twice in the course of the trial. It gave rise to a comment by the appellant, a comment which the learned judge would seem to agree with, that it was tailored to fit the evidence led. In its final form, it admitted certain extra works but said that the work in the claims in (a) and (j) with certain exceptions was to be paid for at the rate of $80 per ton (increased from $65 per ton) and averred that these exceptions were part of the lump-sum contract. It also averred that the claim in (d) was to be at the rate of $65 per ton and that it included the claims in (e) and (f). It denied the work in (c), (h) and (i) and in the alternative, it contended that these items were part of the lump-sum contract. It finally admitted the claim in (g). It refuted (k) entirely. It charged the appellant with failure to charge at the agreed rate and averred that until this was done, it was unable "to study the figures and arrive at the exact amount due to the appellant" on claims (a), (i), (d), (e) and (f), presumably on the suggestion that the respondents did not know the work they had given to the contractor to do.

The respondents also counterclaimed for loss of profits from late completion quantified at $850,000 and general damages and a further sum of $22,744.37 for the use of their cranes by the appellant. But this counterclaim was withdrawn by the respondents on the last day of a long and protracted trial. It is however still a matter for this court, and the question is the proper costs to be awarded on the dismissal of this counterclaim.

Two issues arose from the pleadings: the amount of the extra work and the rate to be paid for it. These are mere questions of fact but such was the wealth of details, they occupied the court over nineteen days of hearing, spread over 17 months and caused a delay of nearly 5 years in the issue of the judgment.

It is now time to turn to the award made by the High Court. But before doing so, it may be appropriate here to advert to one facet of this long story in which the learned judge clearly disbelieved the appellant. It concerned the question whether the appellant was shown the erection schedule and the dispute lay in whether it was before or after tendering. The appellant said it was after; the respondents contended otherwise. Now it is an undeniable fact that the tender of the appellant was not fully in accordance with the erection schedule. The learned judge thought that that was due to an inexperience in kiln erection of the appellant, who was otherwise an experienced J.K.R. (i.e. Public Works Department) contractor. Moreover he could not understand how anyone could tender without sight of all the documents. He therefore accepted the evidence of Ng Hong Heng that he did show the appellant all the tender documents. But it is noticeable that Ng Hong Heng did not at any time claim that he had shown the appellant all the tender documents before the latter tendered for the work. The appellant admitted he was shown certain drawings. From them he made his tender. It is not impossible. There is nothing inherently at variance with his contention that he was not shown the erection schedule earlier. His evidence was in fact supported by the defence that at the time when he was congratulated for his success in tendering for the construction, the appellant was taken aside and shown how his tender had not complied with the requirements of the schedule and he was asked to accept the contract on the terms of and subject to the requirements of the erection schedule. The appellant did not deny that he did. He admitted that he accepted that the lump-sum contract was to be executed in accordance with the erection schedule. But this was a consensual variation on his part of his tender. His acceptance of the erection schedule did not by itself hold him out as a liar when he said he was only shown the drawings when he was invited to make an offer for the work. Nor the fact that the other two tenderers were shown the full tender documents. The informality of the appellant's tender must speak for it. But save as insofar as the credit as a witness is concerned, we do not, with respect, see the relevance of this evidence, as even the appellant accepted that the lump-sum contract was to be in accordance with the erection schedule and the so-called counter-proposal of the respondents of November 21, 1963 was nothing more than their requirement that the tender was to be on such lines.

We now have to deal with the claims in detail and we propose to follow the lines taken by the learned judge. He dealt first with the claim in (c).

Claim (c): Charges for extra work for kilns 1 & 2 — $18,000

He found this claim to be in three parts. In the first, the claim for labour charges for setting girth gear spring, spring plates for drilling and rivetting at site came to $4,800 which the learned judge found to be part of the lump-sum contract. He therefore disallowed it. He however allowed the other two parts in the sum of $13,200.

We see no reason whatsoever for differing from the learned judge, but it is to be observed that in respect of this item, the learned judge rejected the denial of the respondents in their defence that the work was carried out and the alternative contention that the whole of it was part of the lump-sum contract.

Claim (a): Clinker coolers, ID etc. — $205,990.25 (adjusted)

The learned judge found that part of this claim was for the hire of cranes and assembling and reassembling rollers in kiln No. 1. The total of this part of appellant's claim was $20,744, inclusive of a sum of $9,222 described as for loss of time in respect of kiln No. 2 by reason of having to reinstall the machinery in kiln No. 1 which required drilling oil drain out-holes.

Now this $20,744 included a sum of $2,300 for the hire of the crane used. There would appear, when evidence was called, to be no dispute about this. The learned judge awarded $9,220 for the work done on kiln No. 1, accepting the evidence of the appellant and rejecting that of the respondents. He however disallowed the claim in the similar sum of $9,220 for loss of time, even though there would appear to have been no challenge in the evidence for the respondents that Ng Hong Heng had acceded to this, as in the evidence for the appellant, and further, as the learned judge observed, Ng Hong Heng "was not called to rebut the plaintiff's allegation." The failure to do so which led the learned judge to find for the appellant in respect of the claim for kiln No. 1 must have the same effect on the claim in respect of kiln No. 2. However, we do not feel confident in differing from the learned judge as it is clear that the loss of time and the work done in "overhauling" as claimed by the appellant and "cleaning" as found by the judge could not justify a claim for as much as $9,220.

As for the balance of $185,246.25 of the claim under this head, the essential difference between the parties is whether the labour supplied should be paid for by tonnage or by labour charges. The learned judge found that part of the work was done on a tonnage basis. This time, he accepted the packing lists, which he subsequently rejected, as relevant proof, and found a figure which he rounded off to 380 tons. The rate was $80 and he therefore awarded $24,480. For the other part, which did not and could not involve tonnage and which consequently had to be paid for by labour charges, he took the lower rate which was charged by Thum Yee in preference to the higher rate charged by Lee Wah and he awarded $31,554.15. The appellant therefore lost some $138,434.10 in this claim for extra work.

Insofar as this conclusion of the learned judge is a finding of fact on the oral evidence set in the appearance and demeanour of the witnesses before him, this court must remember that it should not without sufficient reason differ. But it is equally clear that where the learned judge had not considered all the evidence and had not given to each bit its probative value, then his conclusion must be reviewed and the duty is on the appellate court to consider whether his conclusion can on the whole be upheld. In this case, it seems to us that any value that may properly be placed on the learned judge's appreciation of the witnesses must be greatly diminished in the considerable time that had elapsed from their appearance before him to his writing out his judgment. It also seems to us, reading his judgment, that he had not fully considered and given the proper evidentiary value to the documentary evidence before him, the fact that by deliberate choice the respondents opposed successfully the application by the appellant to call as witness the Japanese engineer who had at all relevant times dealt with the appellant or to obtain his evidence on commission, and the burden of proof in a civil case.

The documentary proof is in the 16 work books kept by the appellant showing for the whole period a daily record of the workmen supplied, the hours of work and other relevant particulars. They are records ordinarily kept for a claim on a work-rate basis. Moreover each daily record was shown to a representative of the respondents, and dutifully certified by him. These records the learned judge totally rejected.

The reason for rejecting them was his acceptance of the explanation given by the certifying officer, one Wong Kam Weng, that it was not his job to certify the extra work, he did not know what were the extra works and Ng Hong Heng had, to quote from the judgment, "instructed him to certify the entries and to leave the matter to him (Ng Hong Heng) to sort out the matter when the bills were submitted later." To our ears, this explanation rang hollow. If the explanation was true, it would mean that from the beginning, the respondents knew that the appellant would be claiming on a work-rate basis instead of the tonnage basis, and yet they allowed him to continue in this misconception, intending in the end a rude awakening which Ng Hong Heng would have the court believe was deserving for a friend. We would have thought that the proper, wisest and kindest course to take, immediately on learning that there was a misunderstanding (if indeed there was one) would be to put matters on the correct basis between them, and for Ng Hong Heng to confront the appellant and ask him for the meaning and purpose of the work books. Further, Wong Kam Weng was no robot or a lowly clerk. He was an executive and though he had risen from the ranks, his part was not merely to learn as the learned judge thought and we do not pretend to understand how he could be believed when he said he signed without knowing the reason for doing so.

Now it is the contention of the appellant that the supply of this extra labour force so meticulously recorded in the work books was required by the Japanese engineer and that this engineer was the one person who could testify to the correctness of the entries in the work books. But, as was observed earlier, this engineer was prevented by the deliberate obstruction of the respondents from testifying and his evidence was lost to the trial court. Surely then, the tactics of the respondents called for the application of the presumption under section 114(g) Evidence Act, 1950. This presumption must prove the truthfulness of the work books.

Then we turn to the burden of proof. So often difficult issues of fact can be solved by applying the ordinary rules of proof. In our view, the appellant had discharged the burden on him which is to prove on a balance of probabilities that the work was to be paid for on a work-rate basis. The burden then shifts to the respondents. They could discharge this burden, again on a balance of probabilities, by oral or documentary evidence but we do not, with respect, consider that they could be said to have done so by

a defence that did not make sense and by suppressing evidence which was available.

We therefore allow the appeal under this head of claim and increase the award to $196,766.25.

Claims (d), (e) and (f): Labour force, the coal and ash conveyors at Connaught Bridge Power Station

This was work done in respect of the purchase by the respondents of the coal and ash conveyors at Connaught Bridge Power Station. The conveyors had to be dismantled, loaded and transported. Rivets also had to be cut. The claim of the appellant was on a tonnage basis for a tonnage of 900 tons. The respondents were the ones who could have proved beyond any shadow of doubt the actual tonnage but chose not to do so. But at their suggestion, the learned judge took the number of lorry trips, multiplied the number by the permissible load for the lorries and he came to a figure of 780 tons for claim (d) and 580 tons for claim (e). He disregarded the suggestion of the appellant of a practice of over-loading.

In the absence of more reliable evidence from the appellant, we would not disturb the award.

Claim (g): Supply and Laying of fairface bricks

No appeal arises from this award as it was allowed in full on the admission of the respondents.

Claim (h): Cost of erection gantry

The claim for $21,624.86 was reduced by the learned judge to $10,000 but there is no appeal under this head.

Claim (i): X-ray welding

This claim for $48,246.50 was made in the belief that the requirement for such a high standard of welding as would pass an X-ray test must be suitably rewarded. That standard of welding was required by the contract. Counsel for the appellant at the hearing of the appeal did not persist and the appeal from the disallowance of this head of claim must be dismissed.

Claim (j): Alterations and erection of crusher conveyor, etc.

This claim for $56,958.50 was on a work-rate basis. The appellant similarly kept work books but only one work-book was produced, the others having been said to be lost. The appellant claimed on this basis as far back as June 1965, but the respondents countered with a tonnage rate only in May 1967. The learned judge also noted that the defence had been amended on three occasions to suggest an answer to this claim. But on the evidence which he found, of the intention of the respondents to give the contract on a tonnage basis and that Lee Wah and Thum Yee had tendered for the work on this basis, the latter also having done similar work at $80 per ton, the learned judge awarded $11,720 on a tonnage of 146½ tons, the figure estimated by a quantity surveyor, to which he added an assessed sum of $4,000 for alterations and modifications which must be on a work-rate basis.

In all the circumstances of this claim, we are not prepared to differ from the learned judge.

Claim (k): Bonus

The claim for bonus was not founded on contract. If an ex-gratia claim, it is equally not maintainable. The appeal from the dismissal of this claim must be dismissed.

Interest

The learned judge exercised his discretion in the matter of interest by awarding interest at the rate of 6% from the date of the judgment to the actual date of payment. He rejected but without giving reasons the contention of the appellant that interest should run from the completion of the contract in August 1965. Clearly the exercise of judicial discretion in this case was wrong. If the governing principle is, as stated by Lord Herschell L.C. in *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry Co.*[1] at page 437 that interest is awarded to the plaintiff not as compensation for the damage done, but for being kept out of money which ought to have been paid to him, then clearly the interest should run at the latest from the completion of the contract. Counsel for the respondents when asked to uphold this award of interest took some time for consideration and consultation and he then frankly admitted that he could not justify it.

We therefore allow the appeal on this point and order that interest at 6% should run from the completion of the contract in August 1965 to payment.

Costs

The learned judge gave the appellant costs on the claim and on the dismissal of the counterclaim but on the lower scale, without regard to the amounts of the claim and the counterclaim. He gave no reasons for the award but he commented in respect of the counterclaim that the appellant had put in "considerable work" to merit it. It is clear beyond argument that the work to establish the claim was even more considerable.

Costs are in the discretion of the trial judge as is the scale of such costs. However, Order 65 rule 9 Rules of the High Court, 1957, a local rule, provides that costs may be allowed on the higher scale in any cause or matter "on special grounds arising out of the nature and importance or the difficulty or urgency of the case." Rule 10 of the same Order, another local rule, provides that "... generally in all cases where the ... subject-matter of the action suit or proceeding exceeds five thousand dollars ...", costs shall be allowed on the higher scale.

On these rules, it seems to us that, having regard to the defence, this case calls for the award of costs on the higher scale and we would allow the appeal on this matter.

In the result and for the reasons given, we allow the appeal to the extent of increasing the sum of $40,498.95 to $178,933.05 with interest at 6% from August 1965 to the date of payment and we order that the appellant shall have costs in the High Court and in this court on the higher scale.

Appeal allowed.

Solicitors: *Skrine & Co.; Ng Ek Teong & Partners.*